PROPOSAL 06-2

On November 7, 2006, Michigan voters will decide whether to adopt a constitutional amendment prohibiting public institutions from using affirmative action programs that grant preferential treatment on the basis of race or sex in employment, education, or contracting. The result of a petition drive, Proposal 06-2 will appear on the ballot as follows:

A PROPOSAL TO AMEND THE STATE CONSTITUTION TO BAN AFFIRMATIVE ACTION PROGRAMS THAT GIVE PREFERENTIAL TREATMENT TO GROUPS OR INDIVIDUALS BASED ON THEIR RACE, GENDER, COLOR, ETHNICITY OR NATIONAL ORIGIN FOR PUBLIC EMPLOYMENT, EDUCATION OR CONTRACTING PURPOSES

The proposed constitutional amendment would:

- *Ban public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and school districts.*
- *Prohibit public institutions from discriminating against groups or individuals due to their gender, ethnicity, race, color or national origin. (A separate provision of the state constitution already prohibits discrimination on the basis of race, color or national origin.)*

Should this proposal be adopted?

If a majority of the electors vote "yes", Proposal 06-2 will add Section 26 to Article I of the State Constitution.

Existing Law

Michigan's Elliott-Larsen Civil Rights Act prohibits discrimination in employment, education, public services, and public accommodations on the basis of race, sex, color, national origin, age, height, weight, religion, or marital status. The Federal Civil Rights Act prohibits employment discrimination based on race, color, religion, sex, or national origin; prohibits sex discrimination in educational programs receiving Federal funding; and contains other antidiscrimination provisions. The State Constitution prohibits discrimination because of religion, race, color, or national origin in the "enjoyment of civil and political rights", and both the State and U.S. Constitutions guarantee equal protection under the law.

Various decisions of the U.S. Supreme Court have determined the extent to which government may use affirmative action programs. In higher education, a school may use minority status as one factor contributing to student-body diversity, but may not give a fixed number of points or use a minority quota. In government employment and contracting, programs using minority status as a criterion must show a compelling governmental interest (such as remedying the effects of past discrimination).

Impact of Proposal 06-2

The primary impact of Proposal 06-2 would result from its language stating that public institutions "shall not…grant preferential treatment" based on race, sex, color, ethnicity, or national origin in the operation of public employment, education, or contracting. Although the proposed constitutional amendment itself does not use the term "affirmative action", government at all levels and public schools would no longer be allowed to implement what are commonly referred to as affirmative action policies.

If the ballot proposal were approved, a number of existing programs and practices likely would become illegal. These include, for example, public university programs that explicitly consider race, gender, ethnicity, or national origin in admissions, and that target scholarships to minority students. Less clear is whether the amendment would prevent outreach efforts that focus on women or minorities but do not exclude others.

To some extent, it can be determined what the proposed amendment would *not* do. According to its language, Article I, Section 26 would not:

-- Prohibit action that must be taken to establish or maintain eligibility for any Federal program, if ineligibility would result in a loss of Federal funds to the State.
-- Prohibit bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
-- Invalidate any court order or consent decree in force on the effective date of the section.

Section 26 also states that it would apply only to action taken after the effective date of the section. In addition, it would apply only to *public* institutions. It would not directly affect private sector affirmative action programs, or impose new limitations on private discrimination. The amendment also would not prohibit programs that give preferential treatment on the basis of such factors as socioeconomic status or geography. Further, the amendment would apply only to public employment, education, and contracting; it does not mention public programs in other areas, such as health care services.

If the ballot proposal is approved, it is very likely that the courts will have to determine whether the amendment outlaws an individual program, or whether a particular practice will be allowed to continue.

PROPOSAL 06-4

On November 7, 2006, Michigan voters will decide whether to amend the State Constitution, to provide that the taking of private property by a governmental entity for transfer to a private entity for the purpose of economic development or enhancement of tax revenue would not be considered to be for public use. Proposal 06-4 is the result of Senate Joint Resolution E, which was approved by the Legislature in 2005. The following language will appear on the ballot:

A PROPOSED CONSTITUTIONAL AMENDMENT TO PROHIBIT GOVERNMENT FROM TAKING PROPERTY BY EMINENT DOMAIN FOR CERTAIN PRIVATE PURPOSES

The proposed constitutional amendment would:

- *Prohibit government from taking private property for transfer to another private individual or business for purposes of economic development or increasing tax revenue.*
- *Provide that if an individual's principal residence is taken by government for public use, the individual must be paid at least 125% of property's fair market value.*
- *Require government that takes a private property to demonstrate that the taking is for a public use; if taken to eliminate blight, require a higher standard of proof to demonstrate that the taking of that property is for a public use.*
- *Preserve existing rights of property owners.*

Should this proposal be adopted?

Proposed Constitutional Amendment

Article X, Section 2 of the State Constitution prohibits the taking of private property for public use without just compensation first being made or secured in the manner

prescribed by law. Proposal 06-4 would amend Article X, Section 2 to provide that "public use" would not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. Private property otherwise could be taken for reasons of public use as that term was understood on the effective date of the constitutional amendment. In a condemnation action, the burden of proof would be on the condemning authority to demonstrate, by a preponderance of the evidence, or, if the taking were for the eradication of blight, by clear and convincing evidence, that the taking was for a public use. The amendment provides that any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by Section 2, by statute, or otherwise, would not be abrogated or impaired by the constitutional amendment.

Background

County of Wayne v *Hathcock* (471 Mich 445)

In 2004, the Michigan Supreme Court issued its opinion in this case overturning its 1981 decision in *Poletown Neighborhood Council* v *Detroit*, which had allowed the condemnation and transfer of private property to a private entity for the purpose of economic development. Several years ago, Wayne County initiated condemnation proceedings against 19 property owners who refused to sell their land for the construction of a large business and technology park. The property owners argued that the condemnations violated the State Constitution because the project would not serve a public purpose. The trial court and, subsequently, the Court of Appeals, citing the 1981 *Poletown* decision, affirmed the county's position, and the property owners appealed to the Michigan Supreme Court.

The Court pointed out it was well established that the constitutional "public use" requirement was not an absolute bar against the transfer of condemned property to private entities, but it did work to prohibit the State from transferring condemned property to private entities for a *private use*. Accordingly, the Court concluded that the transfer of condemned property is a "public use" if it possesses one of three following characteristics:

- A "public necessity of the extreme sort" is involved and addresses a specific need: "enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving", e.g., highways, railroads, and other instrumentalities of commerce.
- The acquiring private entity "remains accountable to the public in its use of that property", and the land "…`will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*'"
- The land to be condemned "…must be selected on the basis of 'facts of independent public significance,' meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement."

The Court determined that the proposed condemnations did not satisfy any of these criteria and thus were unconstitutional. The Court also noted that *Poletown* was the first case in which it was held that a private entity's pursuit of profit amounted to "public use" because of the residual benefit to the economy. The Court pointed out that virtually any exercise of eminent domain power on behalf of a private entity could be rationalized on the basis of economic benefit. For these reasons, the Court overruled *Poletown.*

Kelo v *City of New London, Connecticut*

In this 2005 opinion, the U.S. Supreme Court addressed whether the City of New London's proposal to use the power of eminent domain to acquire the property of unwilling property owners for a city development plan qualified as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the U.S. Constitution. The Court noted that it historically had afforded "...legislatures broad latitude in determining what public needs justify the use of the takings power." In this case, the city had invoked a state statute specifically authorizing the use of eminent domain to promote economic development. The Court determined that the city's plan unquestionably served a public purpose, and the takings thus satisfied the public use requirement of the Fifth Amendment.

Although the Court ultimately sided with the city, it stated, "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline."

Related Legislation

If Proposal 06-4 were approved by voters, Senate Bill 693 and House Bill 5060 could take effect on December 23, 2006. The bills would amend the statute that regulates the acquisition of property by State agencies and public corporations, by adding provisions similar to those in the proposal. Additionally, under the bills, the taking of private property for public use would not include a taking that was a pretext to confer a private benefit on a private entity. House Bill 5060 also describes criteria that property would have to meet in order to be declared "blighted".

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An Overview

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